1968

G. L. Cloud And Helen Cloud, His Wife, And Sandra Cloud, Their Daughter v. E. S. Ziegler, Judge Of The Juventile Court At Ogden, Utah; Claud Pratt, Superintendent Of The Utah State Industrial School At Ogden, Utah And Judy Ross, An Employee Of The Children's Service Society At Ogden, Utah And G. L. Cloud And Helen Cloud, His Wife, And Sandra Cloud, Their Daughter v. Rex Ashdown, Director Of The Children's Aid Society At Ogden, Utah : Appellant's Brief

IN THE SUPREME COURT OF THE STATE OF UTAH

G. L. Cloud and Helen Cloud, his wife, and Sandra Cloud, their daughter,
Plaintiffs and Appellants,

vs.

E. S. Ziegler, Judge of the Juventile Court at Ogden, Utah; Claud Pratt, Superintendent of the Utah State Industrial School at Ogden, Utah and Judy Ross, an employee of the Children's Service Society at Ogden, Utah,
Defendants and Respondents,

and

G. L. Cloud and Helen Cloud, his wife, and Sandra Cloud, their daughter,
Plaintiffs and Appellants,

vs.

Rex Ashdown, Director of the Children's Aid Society at Ogden, Utah,
Defendant and Respondent.

Case No. 11016

APPELLANT'S BRIEF

Appeal from a judgment denying Sandra Cloud's petition for a writ of Habeas Corpus and denying the petition for writ of Habeas Corpus for Baby Boy Cloud.
Hon. John F. Wahlquist, Judge

A. M. Marsden
616 Judge Building
Salt Lake City, Utah
Attorney for Plaintiffs and Appellants

Phil L. Hansen, Attorney General of the State of Utah and
J. Franklyn Allred and Gerald Gundey
Assistant Attorney Generals
State Capitol Building
Salt Lake City, Utah
Jay Wilson, Weber County Attorney
City and County Building
Ogden, Utah

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STATEMENT OF THE KIND OF CASE

This is an action for a writ of habeas corpus to discharge Sandra Cloud and her male baby from the custody and control of the defendants.

DISPOSITION IN THE LOWER COURT

On August 23, 1967 the Honorable John F. Wahlquist, Judge of the Second Judicial District Court denied the petition of Sandra Cloud to be discharged from the State Industrial School and to release and discharge her male baby; Court ordered the petition of habeas corpus for the baby taken under advisement until the juvenile court has ruled upon its hearing set in September. The Defense Counsels' to submit the order of the court to the court for signature. After juvenile court's decision writ to discharge baby was denied.

RELIEF SOUGHT ON APPEAL

The plaintiffs seek to reverse the order of the District Court for Weber County, Utah and to have this court order the discharge of both Sandra Cloud, and her baby, and place the baby in her care, control and custody, or in the alternative ti place the baby in the care, control and custody of its grandparents.

STATEMENT OF FACTS

This action was commenced in the Third Judicial District Court for Salt Lake County, Utah by G. L. Cloud, and Helen Cloud, his wife, and Sandra Cloud, their daughter, for a writ of habeas corpus, discharging Sandra Cloud, a minor of 16 years, and her baby, which

had been born to her in the Dee Memorial Hospital in Ogden, Utah on the 21st day of June, 1967 (R 16-Page 18.) The writ was signed by Marcellus K. Snow, one of the Judges of the District Court for Salt Lake County, Utah, on the 6th day of July, 1967 (R-Page unnumbered (follows, in R. supplemental petition in Juvenile Court for Salt Lake County under District Court No. 173326.) This writ was served upon defendants on July 10, 1967. A motion for a change of Venue from the District Court for Salt Lake County to the District Court for Weber County was granted. Motion to dismiss the complaint of the plaintiffs G. L. Cloud and Helen Cloud was denied by Judge Snow. After it had been discovered that the baby had been placed in the custody of the Children's Aid Society a complaint for a writ of habeas corpus was filed in the District Court for Weber County of August 7, 1967 against Rex Ashdown, the director of said Society. The writ was signed by Judge John F. Wahlquist on August 7, 1967 and served upon the defendant the following day. (R 7). A hearing was held on the complaints for the writs on August 16, 1967, but continued until August 23, 1967 (R 8) on which day a further hearing was held at which time the Court entered the order appealed from.

Sandra Cloud became pregnant outside of wedlock and her parents took her to Judge Garff's Juvenile Court. There she was given a hearing and an order commiting her to the State Industrial School, but suspended on condition that she go voluntarily to the State

Hospital in Provo, Utah, which she did, but after a four month's stay at the hospital she left the State Hospital and Judge Garff committed her to the State Industrial School at Ogden.

A hearing was pending in the Juvenile Court in Ogden, to have the baby placed for adoption.

District Court cases for a writ of habeas corpus against E. S. Ziegler et al. was filed in the District Court for Weber County, Utah under Case No. 46885 and against Rex Ashdown, Director of the Children's Aid Society at Ogden, under Case No. 46888.

The foregoing numbered cases were consolidated and heard by the court simultaneously on August 23, 1967, upon complaints of Writs of Habeas Corpus, and at the end of the hearing, the court denied the Writ of Habeas Corpus involving the custody and commitment of Sandra Cloud to the Industrial School of Utah, but continued the case involving the custody and jurisdiction of Baby Boy Cloud until after the hearing in the Juvenile Court. That hearing was held on Tuesday, the 21st day of November, 1967, in which the Judge of said Juvenile Court found that the allegations of the petition to be true, and placed said baby in charge of the State Welfare Department for placement for his adoption and terminating the parental rights of Sandra Cloud, his mother.

The Court found relative to the complaint for Habeas Corpus of Baby Cloud that he was not held

unlawfully by the State Welfare Department or by Rex Ashdown as the Director of the Children's Aid Society, and the writ of Habeas Corpus for release of the said baby to his mother, Sandra Cloud, or to his grandparents, G. L. Cloud and Helen Cloud, was denied.

From the foregoing Findings of Fact, the Court concluded as a matter of law that the Writ of Habeas Corpus releasing Baby Boy Cloud from custody aforesaid should be denied.

Judge Ziegler's Juvenile Court Decree was filed December 13, 1967, and appealed from to this court where the matter can be heard,the court permitting, simultaneously with the writs of habeas corpus cases. The Decree provided as follows:

"It is therefore, ordered, adjudged and decreed:

1. That the above named child (Baby Boy Cloud) is hereby adjudicated within section 77 of the Juvenile Court Act of 1965.

2. That he be and is hereby placed in the legal custody and guardianship of the Children's Aid Society of Utah for the purpose of adoption and that all of the parental rights to said child be and are hereby terminated.

3. That this case be and is hereby set for review ont he 26th day of May, 1969.

First District Juvenile Court

Dated this 21st day of November 1967

By the Court
E. S. Ziegler

ARGUMENT

POINT I

FAILURE TO INFORM THE APPELLANT, SANDRA CLOUD, THAT SHE WAS ENTITLED TO THE SERVICES OF AN ATTORNEY IN THE PROCEEDING IN THE 2ND DISTRICT, JUVENILE COURT, WAS IN VIOLATION OF HER CONSTITUTIONAL RIGHTS.

Although the court found that she had the advice and counsel of an attorney in the 2nd District Juvenile Court, she testified that the counsel was hired for her father and mother, and she had no advice from an attorney. (See Form 13B containing findings of fact and decree of the Ogden Juvenile Court.) (See also Sandra Cloud's testimony before Judge Wahlquist.) See Tr. 4 & 10, 14, 15, 16, see lines 16 & 17).

Sandra, while before Judge Garff, was not told that she had a right to be confronted by witnesses and the right to have them cross examined or the right to counsel for herself and a right to notice of the hear-

ings, that she could keep silent if she wished, or what she might state to any officer taking her into custody, could be used against her at the hearing. See Tr. 10. The following was asked Sandra Cloud:

"The court: Did anybody explain Sandra's rights at that hearing?

Mr. Marsden: They tell me no. Is that correct, Sandra?

Sandra Cloud: Yes." (Lines 18, 20 and 21, Tr. 10). These questions refer to the hearing before Judge Garff after Sandra was brought from the hospital at Provo to the Juvenile Detention Home in Salt Lake County, Tr. 14 and 15).

Sandra Cloud relies on the case of: In The Matter of Gault, 18 L. Ed. 2nd 527 (1967), for discharging her from the State Industrial School and her baby from the custody of the Children's Aid Society. In the case at bar, Sandra Claud was committed to said school at the age of 16. The procedure used in Juvenile Courts had never been examined under the United States Constitution. The *Gault* decision had a revolutionary effect on the law applicable to delinquent children by determining that in all "fact finding" hearings (hearings in whcih it is determined what the child has done and in which determination of delinquency is made which may result in a commitment of the child to an institution) the child must be given all the essentials of due process and fair treatment.

The facts of the *Gault* case are fairly simple: In June, 1964, fifteen-year-old Gerald Francis Gault allegedly telephoned Mrs. Cook, a neighbor of the Gault family in Gila County, Arizona, and made lewd or indecent remarks to her. He was adjudicated a delinquent in Juvenile court and ordered committed to the State Industrial School for boys "For the period of his minority" (until age 21) "unless sooner discharged by due process of law". The factual issue before the Arizona Court was whether Gerald Gault in company of another teenager made obscene remarks by phone to Mrs. Cook. The case was resolved by the Arizona court without furnishing in writing the charges against Gerald to him or his parents, without determining if Gerald wanted counsel, without bringing the accusing witnesses into the hearing, without advising the juvenile of his right to remain silent, without a transcript, and without a right to appeal. The Arizona Supreme Court found that petitioners were not denied due process of law. The Supreme Court of the United States reversed that decision.

The *Gault* case is somewhat more spectacular as an example of abuse of the right of a juvenile offender than the case at bar. The following factors are comparable between the cases.

In the *Gault* case the erring juvenile was fifteen years of age when the offense was committed. In the case at bar the juvenile offender was sixteen years of age.

2. In both cases the child was adjudicated without determining if he wanted counsel, without bringing the accusing witness or witnesses into the hearings, without advising the juvenile of his right to remain silent, without submitting evidence swearing any witnesses and without counsel specifically as her counsel.

RIGHT TO COUNSEL

Case Law on Right to Counsel:

The standard as established in the *Gault* case with regard to the right of a juvenile and his parents to be represented by Counsel is that the Fourteenth Amendment Due Process Clause * * *

" . . . requires that in respect of proceedings to determine delinquency which may result in commitment to an institution in which the juvenile's freedom is curtailed, the *child* and his parents must be notified of the child's rights to be represented by counsel retained by them, *or if they are unable to afford counsel, that counsel will be appointed to represent the child.*" (Emphasis added.) 18 L.Ed. 2nd at 554.

The clear holding of the court is that not only must the *child* and his parents be notified of the *child's* right to be represented by counsel of their choosing, but if they are unable to afford counsel the court must inform them of their right to have appointed counsel. It is important to note that the court has an affirmative duty to inform *the juvenile* and his parents of their right to

counsel. *Carnley v. Cochran,* 369 U.S. 506 (1962). Therefore, the court fails to so advise both *the child* and parents, and proceeds with the hearing, the adjudication of delinquency and the order of commitment in the absenceof counsel for *the child* and his parents or an express waiver of the right by both parties to the constitutional rights of the child under the due process clause will have been violated and the court proceedings fatally defective.

The court in the *Gault* case made it clear that neither the judge nor the probation officer is in a position to act as counsel for the child. The court stated that "there is no material difference in this respect between adult and juvenile proceedings, this contention has been foreclosed by decisoins of this court.

Powell v. Alabama, 287 U.S. 45, 61, 77 L.Ed. 158, 166, 53 S. Ct. 55, 84; *Gideon v. Wainwright,* 372 U.S. 335, 9 L. Ed. 2d 799, 83 S. Ct. 792; 18 L.Ed 2d at 551. The court further stated at page 551:

> "A proceeding where the issue is whether the child will be found to be delinquent and subject to the loss of his liberty for years is comparable in seriousness to a felony prosecution. The juvenile needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it. The child requires the guiding hand of counsel at every step in the prceedings."

The court also stated at page 551:

> " . . . we hold that it (the assistance of counsel) is . . . essential for the determination of delinquency, carrying with it the awesome prospects of incarceration in a state institution until the juvenile reaches the age of 21."

In conclusion,t he court observes at page 554:

> "We conclude that the due process clause of the 14th Amendment requires that in respect of proceedings to determine delinquency which may result in the commitment to an institution in which the juvenile's freedom is curtailed, *the child and his parents* must be notified of the *child's rights* to be represented by counsel retained by them or if they are unable to afford counsel, that counsel will be appointed to represent the child."

Utah Statutory Law on Right to Council.

The holding of the Supreme Court in the *Gault* case with regard to counsel could not have come as too great a shock to the Juvenile Court System of Utah. Section 55-10-96 of the Utah Juvenile Court Act provides:

> "Parents, guardian, the child's custodians, and the child, if old enough, shall be informed that they have the right to be represented by counsel at every stage of the proceedings. They have the right to employ counsel of their own choosing; and if any of them request an attorney and is found by the court to be without sufficient financial means to employ an attorney, counsel shall be appointed by the court."

The Utah statute limits the duty of a court to inform the child of his right to be represented by counsel to those children only who are "old enough." *Gault* places no such limitation on such a fundamental right as this. Both child and parents, according to *Gault,* have the absolute right to be informed of their rights in this regard.

Likewise, the Supreme Court in *Gault* puts an absolute duty upon the court to inform the juvenile and his parent, if they are indigent, of their right to have the court appoint an attorney to represent them free of charge. Contrary to the Utah statute, the right of the *child* and his parents in this regard is in full effect whether they request an attorney or not.

POINT II

THE JUVENILE COURT OF THE FIRST DISTRICT IN OGDEN WAS WITHOUT AUTHORITY TO PLACE BABY BOY CLOUD OUT FOR ADOPTION.

How can Sandra Cloud be charged with delinquency or neglect of her child when she has never had its custody from the date of its birth on June 21, 1967 at the Dee Hospital, but only saw the baby for 5 or 10 minutes after its birth? (Tr. 18). Sandra Cloud has never had an opportunity to demonstrate her capabilities in caring for her child, since she was an inmate of the Industrial School. Whether the baby is a dependent child cannot be determined until she has been

granted the care, charge and custody of the baby. We think, therefore, that the Juvenile Court at Ogden had no power or authority to place the baby out for adoption in custody of the Children's Aid Society of Utah. See decree on Form 13B of the Juvenile Court filed December 13, 1967.

The Juvenile Courts of Utah have exclusive original jurisdiction over persons under 18 years of age who are either delinquent, dependent or neglected, except in felony cases. Baby Boy Cloud falls in none of these categories until his mother has been given his custody and demonstrates that the baby has become dependent or neglected by her lack of proper maternal care. Utah Code Annotated 1953, Section 55-10-5.

CONCLUSION

It is respectfully submitted that the order of the District Court for Weber County, Utah, should be reversed denying the plaintiffs the right of habeas corpus in this matter and discharge Sandra Cloud from the State Industrial School and her baby from the custody of the Children's Aid Society of Utah and that the Decree of the First Juvenile District Court of Utah, placing the baby in the custody of the Children's Aid Society for adoption be declared null and void and that the baby be given to his mother or in the alternative to his grandparents.

Respectfully submitted,

A. M. MARSDEN
Attorney for Appellants